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No. 82-274

In the Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA
et al.,
Petitioners

vs.

DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR
and
UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED

1. Whether a federal court can hold a state and its executive branch officials in contempt of a consent decree because of the state legislature's failure to appropriate in perpetuity funds necessary to exercise a police power function?

2. Whether a federal court can block the United States from funding highway projects authorized by Congress as a sanction for the inability of state officials to implement a consent decree having nothing to do with those highway projects?

3. Whether a federal court can impose a sanction for contempt without considering the harm caused thereby to millions of innocent third parties?

4. Whether a federal court exceeded its authority by arrogating to itself the power to approve or disapprove each decision of executive branch professionals concerning the certification of state highway projects as related to safety, air quality, or mass transit?

TABLE OF PARTIES

DELAWARE VALLEY CITIZENS' COUNCIL FOR CLEAN AIR; AMERICAN LUNG ASSOCIATION OF PHILADELPHIA AND MONTGOMERY COUNTY; DELCHESTER LUNG ASSOCIATION; SIERRA CLUB, PENNSYLVANIA CHAPTER; FRIENDS OF THE EARTH OF THE DELAWARE VALLEY; CITIZENS' COMMITTEE FOR ENVIRONMENTAL CONTROL; KEVIN QUINN, KAYSI FARRELL, RUTH G. WEISS; JOHN KLINKNER, ELIZABETH S. BIEZ; MONA SHULMAN

Plaintiffs

v.

COMMONWEALTH OF PENNSYLVANIA; WILLIAM T. SHERLOCK, Individually and as Secretary of the Pennsylvania Department of Transportation; MAURICE K. GODDARD, Individually and as Secretary of the Pennsylvania Department of Environmental Resources

Defendants

(D.C. Civil No. 76-2068)

UNITED STATES OF AMERICA

Plaintiff

v.

COMMONWEALTH OF PENNSYLVANIA; the PENNSYLVANIA DEPARTMENT OF TRANSPORTATION and WILLIAM T. SHERLOCK, Secretary of the Pennsylvania Department of Transportation; the PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and MAURICE K. GODDARD, Secretary of the Pennsylvania Department of Environmental Resources

Defendants

(D.C. Civil No. 77-0619)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, the Commonwealth of Pennsylvania, Thomas D. Larson, the Pennsylvania Secretary of Transportation, and Peter S. Duncan, the Pennsylvania Secretary of Environmental Resources, hereby respectfully petition this Court that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit which was entered in this case on May 21, 1982.

I. OPINIONS OF THE COURTS BELOW

The opinion of the District Court dated January 22, 1982, is reported at 533 F. Supp. 869. The opinion of the District Court dated February 18, 1982, denying the motion for a stay is reported at 533 F. Supp. 885. These two opinions are reproduced at 1a to 34a and at 35a to 38a respectively.

On March 19, 1982, the Court of Appeals granted a stay and on April 6, 1982, the Court denied a petition for rehearing on the stay. These two opinions are not yet reported and are printed in the Appendix at 39a to 41a, and at 42a to 49a. The opinion of the Court of Appeals dated May 21, 1982, is reported at 678 F.2d 470 (3d Cir. 1982) and is reproduced at 50a to 68a.

II. JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Article I, Section 8, Clause 7:

"The Congress shall have Power . . . To establish Post Offices and post Roads. . . ."

2. United States Constitution, Article I, Section 9, Clause 7:

"No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ."

3. United States Constitution, Article I, Section 1:

"All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

4. United States Constitution, Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. Pennsylvania Constitution, Article III, Section 24:

"Paying out public moneys.

No money shall be paid out of the Treasury, except on appropriations made by law. . . ."

6. Clean Air Act Amendments of 1977, Public Law 95-95, 91 Stat. 749, 750, §176; 42 U.S.C. §7506:

"Limitations on certain Federal assistance.

(a) The Administrator shall not approve any projects or award any grants authorized by this chapter and the Secretary of Transportation shall not approve any projects or award any grants under Title 23 other than for safety, mass transit, or transportation improvement projects related to air quality improvement or maintenance in any air quality control region—

(1) in which any national primary ambient air quality standard has not been attained,

(2) where transportation control measures are necessary for the attainment of such standard, and

(3) where the Administrator finds after July 1, 1979, that the Governor has not submitted an implementation plan which considers each of the elements required by section 7502 of this title or that reasonable efforts toward submitting such an implementation plan are not being made (or, after July 1, 1982, in the case of an implementation plan revision required under section 7502 of this title to be submitted before July 1, 1982).

(b) In any area in which the State or, as the case may be, the general purpose local government or governments or any regional agency designated by such general purpose local governments for such purpose, is not implementing any requirement of an approved or promulgated plan under section 7410 of this title, including any requirement for a revised implementation plan under this part, the Administrator shall not make any grants under this chapter."

IV. STATEMENT OF THE CASE

This action was commenced in July, 1976 by Delaware Valley Citizens' Council for Clean Air[1] (hereinafter "Delaware Valley") against the Commonwealth of Pennsylvania and certain of its Executive Branch officials[2] (hereinafter "Defendants").[3] Plaintiff sought to compel the Defendants to implement an emission inspection and maintenance program (hereinafter "I/M program") in fourteen of Pennsylvania's 67 counties. Also named as a defendant was an official of the United States Environmental Protection Agency whom Plaintiff sought to compel to have the Defendants implement an I/M program.[4] Plaintiff based its complaint on the Clean Air Act of 1970, 42 U.S.C. §1857, et seq. (since amended and reclassified

[1] Delaware Valley is a nonprofit corporation organized under the laws of the Commonwealth of Pennsylvania.

[2] The named defendants are William T. Sherlock, Secretary of the Pennsylvania Department of Transportation and Maurice K. Goddard, Secretary of the Pennsylvania Department of Environmental Resources. The present Secretary of the Pennsylvania Department of Transportation is Thomas D. Larson; the present Secretary of the Pennsylvania Department of Environmental Resources is Peter S. Duncan.

[3] The Pennsylvania General Assembly was not named as a party to this action, although certain of its members moved unsuccessfully to intervene as defendants.

[4] An emission inspection and maintenance program consists of checking the tailpipe emissions (hydrocarbons and carbon monoxide) of vehicles by means of an analyzer and requiring that vehicles which exceed a specified level of emissions have repairs performed to lower their emissions to the specified level.

at 42 U.S.C. §7401 et seq.). In February, 1977, the United States commenced a second suit seeking to compel Defendants to implement an I/M program. As a result, Delaware Valley dismissed the Environmental Protection Agency official as a defendant in its action.

On August 29, 1978, the parties entered into a consent decree requiring Defendants to implement the I/M program. The consent decree provided, *inter alia*, for implementation of the I/M program in ten counties in metropolitan Philadelphia and Pittsburgh, Pennsylvania by February 1, 1981, later extended to November 1, 1981 by agreement of all parties.[5]

Between 1979 and 1981 the Defendants took a number of steps to comply with the consent decree. The Pennsylvania Department of Transportation ("PennDOT") promulgated regulations for operation of the I/M program (67 Pa. Code §177.1 *et seq.*) and established a program to train instructors and mechanics, with the help of public and private educational facilities. The Department certified approximately 3,000 stations for Phase I of the testing of emission control devices. The Department opposed two actions in state court seeking to prevent implementation of the emission inspection program. In addition, De-

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[5] On April 29, 1981, Defendants filed a motion with the United States District Court to modify the consent decree by postponing the date for implementation of I/M to January 1, 1983. Delaware Valley opposed this motion. On May 20, 1981, the District Court denied this motion, and on June 16, 1981, the Court ordered the I/M program to begin by May 1, 1982. The Court of Appeals on March 1, 1982, upheld the order of the District Court and on March 26, 1982, denied a petition for rehearing en banc. On June 21, 1982, Defendants filed a Petition for Certiorari from the Order of March 1, 1982.

fendants are still implementing all elements of its State Implementation Plan under the Clean Air Act except the I/M program. That plan includes standards requiring control measures for stationary sources such as petroleum storage facilities, refineries and other industrial plants.

On October 5, 1981, however, the Pennsylvania General Assembly enacted H.B. 456, over the veto of Pennsylvania Governor Dick Thornburgh, prohibiting PennDOT or any other department or agency of the Executive Branch of the Commonwealth from spending any public funds for the I/M program.[6] Act No. 1981-99, §2, 71 P.S. §523 (Supp. 1982). Within two weeks of the enactment of Act No. 1981-99 over the Governor's veto, Defendants sought to stay and to modify the 1978 consent decree because the passage of Act No. 1981-99 had deprived them of any legal authority to spend money to carry out the I/M program. Delaware Valley filed a motion to declare Defendants in civil contempt and to impose sanctions.

On January 22, 1982, the District Court granted the contempt motion, denied the Defendants' motion, and ordered the United States Secretary of Transportation to withhold any approvals of or grants for highway projects in the ten counties surrounding Philadelphia and Pittsburgh, except where found by the Court to be related to safety, air quality, and mass transit. *Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. 869 (E.D. Pa. 1982) (1a-34a). The amount of funds affected for 1982 alone was $302,-

[6] Governor Thornburgh on December 28, 1979, successfully vetoed H.B. 739, which sought to delay the I/M program.

000,000. On February 18, 1982, the District Court refused to stay its order pending appeal. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. 885 (E.D. Pa. 1982) (35a-38a).

Thereafter, Defendants appealed to the Court of Appeals for the Third Circuit and moved that Court for a stay after the District Court denied a stay. The City of Pittsburgh, the County of Allegheny, the Greater Pittsburgh Chamber of Commerce, the Greater Philadelphia Chamber of Commerce, the Associated Pennsylvania Constructors, and the Pennsylvania Asphalt Pavement Association supported Defendants' appeal and motion for a stay as *amicus curiae*. On March 19, 1982, the Court of Appeals (per the Honorable Arlin M. Adams and the Honorable James Hunter, III, with the Honorable Leonard I. Garth, dissenting) stayed the District Court's order pending submission of this case to a merits panel on May 13, 1982. The Court of Appeals denied Delaware Valley's motion for reconsideration of the stay; as Judge Adams stated on the denial of reconsideration, the Court granted the stay to prevent the loss of funding for important highway projects pending the appeal, and to avoid inflicting unnecessary and perhaps irreparable hardship upon the citizens of Pennsylvania.

On May 21, 1982, the Court of Appeals affirmed the District Court's judgment, holding that because the Commonwealth of Pennsylvania was a party to the consent decree, all its branches, including the Legislature, were bound by that decree. Accordingly the Court found the "Commonwealth" and the executive official defendants to be in contempt because of the legislature's failure to ap-

propriate funds and upheld the sanction imposed by the District Court.[7] It is this decision which Defendants ask this Court to review.

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[7] On June 7, 1982, Defendants filed a motion to stay the Court of Appeals mandate and the order of the District Court. The Court of Appeals denied this motion on June 23, 1982, and certified its May 21, 1982 judgment in lieu of a mandate. An application for a stay of that judgment was denied by Justice Brennan on July 29, 1982, and was resubmitted to Justice Rehnquist on July 30, 1982, who referred it to the entire Court, where it is presently pending.

V. REASONS FOR GRANTING THE WRIT

A. A Federal Court Cannot Hold a State and Its Executive Branch Officials in Contempt of a Consent Decree Because of the State Legislature's Failure To Appropriate in Perpetuity Funds Necessary To Exercise a Police Power Function

1. The lower Courts' orders interfere with Pennsylvania's appropriations process, raising serious questions of federalism and separation of powers.

In this case, the Third Circuit upheld a judgment that the Commonwealth of Pennsylvania and two of its Executive Branch officials can properly be held in civil contempt because the state legislature enacted legislation barring the state's Executive Branch from spending state funds to implement the I/M program established by the consent decree. The Third Circuit's holding raises the question of whether the federal courts may interfere with a state's right to control its own legislative appropriations process, especially when no federal constitutional rights of private parties are involved.

One Court of Appeals has held that:

> No right of a state is entitled to greater respect by the federal courts than the state's right to determine how revenues should be raised and how and for what purposes public funds should be expended (and) needless confrontations between a federal court and

> a state should be avoided particularly in a field as delicate as the one here involved.

Welsch v. Likins, 550 F.2d 1122, 1131-32 (8th Cir. 1977). The lower courts' decisions in this case endanger this fundamental right of a state, through its legislature, to control its own financial affairs.

The Third Circuit justified this massive intrusion into the state legislative process on the ground that the Commonwealth of Pennsylvania was a named party to the litigation and the consent decree and that, therefore, all branches of the Commonwealth, including its legislative branch, were bound by that decree. 678 F.2d at 475 (59a). Thus, according to the Third Circuit, the Commonwealth's status as a named defendant in a consent decree, without more, binds the legislature then in session *and future sessions* to appropriate monies to carry out the consent decree. This holding would destroy the delicate balance between federal and state governments and between the executive, judicial, and legislative branches of state government.

Article III, Section 24 of the Pennsylvania Constitution provides: "No money shall be paid out of the treasury except on appropriations made by law." Thus, in Pennsylvania, the legislature has the exclusive power of appropriation. *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 606 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). Yet, according to the Third Circuit's analysis, executive branch officials such as the Attorney General can, by entering into a consent decree in the name of the "Commonwealth", bind the Commonwealth to operate an I/M program indefinitely into the future, thereby exercising irrevocably both the power

of appropriation and the state's police power.[8] The Third Circuit would allow those officials, by using the federal courts, to assume powers left by the State Constitution exclusively to the legislative branch of government.

Moreover, even if the Pennsylvania General Assembly had been a party to the 1978 consent decree (which it was not), the General Assembly in session at that time simply could not have purported to preclude subsequent legislatures from exercising their constitutional right to pass laws. *Mott v. Pennsylvania Railroad Co.*, 30 Pa. 9 (1858). No legislative body can commit its successors to exercise the state's police power in a certain way. *Stone v. Mississippi*, 101 U.S. 814 (1880). Nor may a legislative body bind its successors to fund an exercise of that power in perpetuity. *Commonwealth ex rel. Fortney v. Bartol*, 342 Pa. 172, 174-175, 20 A.2d 313 (1941), and cases cited therein. Certainly, the 1978 General Assembly could not have delegated to Executive Branch officials a power which it, itself, did not have. Thus, no executive

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[8] Specifically, the Third Circuit concluded that the Attorney General was empowered to enter into this consent decree on behalf of the legislature. 678 F.2d at 475 (59a). In so doing, the Court of Appeals could cite only its own prior holding in *Vecchione v. Wohlgemuth*, 558 F.2d 150 (3d Cir. 1977). That case dealt only with the power of the Attorney General to represent individual defendants. Just as importantly, its conclusion rested solely on statutory provisions expressly empowering the Attorney General to represent executive administrative bodies and officials. 71 P.S. §§292-293 (since repealed). Under Pennsylvania law, the Attorney General, as a member of the Executive Branch, could not have represented another branch of government in litigation, let alone have exercised the basic constitutional powers of that branch. Pennsylvania Attorney General Opinion No. 75-9, February 24, 1975 (69a-74a).

branch official could, by signing the consent decree, have bound the General Assembly to appropriate funds to implement that decree indefinitely into the future.

It follows that a federal court cannot require the parties to the consent decree to exercise a greater power than they can possibly exercise on their own. Accordingly, no federal court can require a state legislature to appropriate funds in perpetuity or place a state and its officials in contempt for failure to do so. *New York State Association for Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980).

The Pennsylvania General Assembly's constitutional power to decide whether or not to appropriate funds for I/M was implicit in the consent decree as a matter of law. Under Pennsylvania law, any contract with the government is conditioned upon legislative appropriation. See *Shapp v. Sloan*, 480 Pa. 449, 473, 391 A.2d 595, 606 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979). This rule must apply equally to consent decrees. Otherwise, as is noted above, state executive officials could use the federal courts to exercise powers which, under state law, are vested exclusively in the legislature. Thus viewed, the Third Circuit's finding that there was "no evidence" of the condition of future appropriations—"even implicitly"—is both irrelevant and erroneous.[9]

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[9] Even the Plaintiffs in this case have admitted that the Legislature's power to decide whether or not to fund I/M was an implied condition in the consent decree. In prior proceedings in this case, Plaintiffs conceded that the consent decree did not require the General Assembly to appropriate funds for its implementation. Specifically, in opposing intervention by state legisla-

Moreover, there is no basis for holding the executive branch officials in contempt in this case. In *Maggio v. Zeitz*, 330 U.S. 56 (1948), this Court held that a party cannot be held in contempt for failing to perform an act which he or she is unable to perform. This principle is directly applicable to the executive branch defendants in this case. State executive branch officials have only those powers granted them by the laws of the Commonwealth

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tors who sought to attack the consent decee, Delaware Valley stated:

> One of the requirements . . . [of the decree] is that the Governor, as chief of the Executive Branch of the Commonwealth, would have to seek adequate funding for the I/M program. If the governor is required to submit a budget to the General Assembly in order to fund the I/M program, the General Assembly might be able to require the Governor's budget proposal to identify with specificity the funds to be appropriated to the I/M program. See 71 P.S. §233. *The General Assembly, including the applicants, has the power to reject proposed appropriations for the I/M program.* Thus, it is clear that the consent decree and its modification do not affect applicants' duties and obligations. (Emphasis added.)

Memorandum of the Plaintiffs Delaware Valley Citizens' Council for Clean Air, et al. in Opposition to the Motion of Edward P. Zemprelli, et al. To Intervene as a Defendant, p. 7 (filed May 2, 1980).

Likewise, in opposing intervention, the United States stated:

> The Consent Decree by its terms *does not require the Legislature to appropriate any monies for I/M* although certainly the failure to fund PennDOT at all could conceivably result in an inability of the Commonwealth to run an I/M program. (Emphasis added.)

Response of the United States in Opposition To Motion To Intervene as a Defendant of Edward P. Zemprelli, et al., p. 12 (filed May 2, 1980).

of Pennsylvania. Under those laws, defendants *cannot* spend monies not appropriated by the legislature. *Shapp v. Sloan*, 480 Pa. 449, 463, 391 A.2d 595, 602 (1978), *appeal dismissed sub nom., Thornburgh v. Casey*, 440 U.S. 942 (1979); *Burd v. Commonwealth*, Pa. Commonwealth Ct. , 443 A.2d 1197 (Pa. Commonwealth Ct. 1982). In Pennsylvania, the legislature has total power of appropriation, and absent appropriation there is no money for the agencies and officials of the executive branch to spend. *Shapp v. Sloan, supra; Burd v. Commonwealth, supra.* It is not a question of legality, but rather of power. Thus, the Third Circuit's attempt to distinguish *Maggio, supra*, because "there has been no showing that there were no funds physically reachable" for I/M, was simply misconceived. 678 F.2d at 476, n. 13 (61a). The legislature's express prohibition on expenditure of state funds for the I/M program made it impossible for the executive branch defendants to comply with the consent decree in this case. Just as this Court barred a finding of contempt in *Maggio*, supra, the impossibility of compliance in this case bars a finding that the executive branch officials are in contempt.

Finally, this Court has long recognized that state legislators cannot be held liable in federal court for their legislative actions. *Tenney v. Brandhove*, 341 U.S. 367 (1950). This immunity extends to actions for declaratory and injunctive relief as well as actions for damages. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732-33 (1980).[10] Yet, according to

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[10] Certainly there can be no argument that sovereign immunity was waived in this case. This Court has repeatedly recognized that waivers of a state's sovereign immunity must be clearly

the Third Circuit, a federal court could apparently, under certain circumstances, fine or even jail members of a state legislature until they enacted legislation deemed appropriate by that court to implement a consent decree.[11]

Simply stated, and as the District Court in this case clearly conceded, "a federal court on the present record lacks the power under our federalist system to countermand the decision of a state legislature not to expend state funds on the establishment of an I/M program".[12] 533 F. Supp. 869, 878 (17a). Yet, the Third Circuit's and the District Court's orders do just that—if only indirectly—by way of a coercive sanction, rather than a direct order. This gross interference with the state's constitutionally created appropriations process presents an issue of federalism which this Court should review.

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stated. See, e.g., *Edelman v. Jordan*, 415 U.S. 651, 673 (1974). Waivers of legislative immunity should be equally explicit. Even the Third Circuit found no such clear waiver in this case.

[11] Specifically, the Third Circuit noted that "[c]ivil contempt proceedings against state officers may justifably result in the fining or even the conditional jailing of those officials." 678 F.2d at 478 (67a). However, the court refused to decide "[w]hether such action might have been warranted against either state legislative or executive branch officers in the circumstances of this case." *Id.*

[12] The District Court based this concession at least in part on the Tenth Amendment to the United States Constitution. This Court has previously granted certiorari in cases questioning, on Tenth Amendment grounds, the ability of the federal legislative and executive branches to interfere directly with the state's legislative process in the context of air pollution. *Environmental Protection Agency v. Brown*, 426 U.S. 904 (1976). This case raises a similar issue concerning the relationship of the federal judiciary to the state legislative process and is, therefore, equally deserving of consideration by this Court.

2. The decision in this case conflicts with the decision of the Second Circuit in New York State Association of Retarded Children, Inc. v. Carey, 631 F.2d 162 (2d Cir. 1980).

This case is on all fours with a recent decision on separation of powers and federalism issues by the United States Court of Appeals for the Second Circuit, *New York State Association of Retarded Children, Inc. v. Carey*, 631 F.2d 162 (2d Cir. 1980). In *Carey*, the Second Circuit reversed a District Court order holding New York State officials in contempt for failure to carry out a consent judgment that had established a panel to review conditions at an institution for the mentally retarded. The state officials had been unable to carry out the order because the New York State Legislature, exercising its appropriations power under Article VII, Section 7 of the New York State Constitution, had cut off funding for the review panel.

The Court of Appeals in *Carey* distinguished cases in which federal courts required states to comply with their decrees, because the Courts in those cases did not force state officials to expend funds for a purpose expressly disallowed by the state legislature:

> Appellees rest this argument upon cases which hold that a state action, or inaction, cannot defeat a constitutional or federally created right. See, e.g., *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 444 U.S. 658 (1979); *North Carolina Board of Education v. Swann*, 402 U.S. 43 (1979). [These cases] did not, however, involve the remedy ordered in this case—that a state official expend state funds for a purpose expressly disallowed by the State Legislature. We

> have previously held, and repeat here, that a Federal District Court ought not to put itself 'in the difficult position of trying to enforce a direct order . . . to raise and allocate large sums of money . . . steps traditionally left to appropriate executive and legislative bodies responsible to the voters'. *Rhem v. Malcolm*, 507 F.2d 333, 341 (2d Cir. 1974).

631 F.2d at 165. The Second Circuit also noted that, in order to obey the consent decree, the New York officials would have had to violate the Constitution and laws of New York State, which proscribed expenditure of state funds without an appropriation. 631 F.2d at 164. The lower courts' orders in this case have placed Defendants in exactly this predicament.[13] The resulting conflict between the Circuits should be resolved by this Court.

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[13] As noted above, state executive branch officials cannot, either as lawyers or parties, bind the legislature to appropriate money. To the contrary, all such officials can promise is to exert "best efforts" to convince the legislature to make appropriations. Accordingly, the Third Circuit's attempt to distinguish *Carey* on the basis of an express "best efforts" provision in the *Carey* consent decree is without merit.

In any case, as is also noted above in fn. 9, plaintiffs conceded that the decree required only the best efforts of the executive branch, but not necessarily action by the legislature. Finally, under Pennsylvania law, any contract with state government is conditioned upon legislative appropriation.

B. The Lower Courts Have Exceeded Their Authority and, in Addition, Their Decisions Conflict With the Decisions of the Seventh and Eighth Circuits

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1. The lower Courts' orders blocking payment of Federal highway funds to Pennsylvania interfere with Congress' exclusive power to appropriate money under the United States Constitution and conflict with the principles of the Eighth Circuit's decision in State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir. 1973).

The lower courts in this case have blocked highway project approvals and effectively impounded highway funds apportioned to Pennsylvania by the United States Congress under the Federal Aid Highway Act, 23 U.S.C. §101 *et seq.* This judicial impoundment is beyond the power of the courts.

Article I, Section 8, clause 7 of the United States Constitution gives the United States Congress the power to establish post roads. Article I, Section 1, and Article I, Section 9, clause 7 of the United States Constitution give Congress the exclusive power to appropriate federal funds. While federal courts admittedly have broad powers to coerce compliance with their orders, they may not impinge upon the exclusive powers of Congress to establish roads and appropriate funds. The sanctions imposed in this case do both.

In *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099 (8th Cir. 1973), the United States Court of Appeals for the Eighth Circuit reaffirmed the broad reach of Congress' power over highway construction in a dispute over presidential impoundment. The Eighth Cir-

cuit enjoined the United States Department of Transportation from impounding highway funds that had already been apportioned to the State of Missouri, because Congress had not provided for impoundment in such circumstances and *only Congress* had the constitutional right to dictate the terms for highway construction:

> . . . we note that in legislating the Federal-Aid Highway Act, Congress was acting under Article I, Section 8 wherein it is given its express constitutional authority to establish "Post Roads." After granting several additional powers to Congress, Article I, Section 8 concludes by setting forth that Congress may "make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Office thereof." It seems reasonable to say that until and unless Congress acted under Article I, neither the Secretary nor anyone else within the Executive Branch of the government could build a federally aided highway system. *The only branch of government which has the constitutional power to build roads is the only one which has the authority to dictate the terms under which the construction can be carried out.*

479 F.2d at 1111. (Emphasis added.)

The *Missouri Highway Commission* decision invalidated executive branch impoundment of highway funds in the absence of any express authorization from Congress. In this case, the lower courts have practiced judicial impoundment without express congressional authority. Such

impoundment is no more proper than impoundment by the executive.

The District Court held, and the Third Circuit reiterated, that §176(a) "suggested" a remedy of a highway funds cutoff in this case. 533 F. Supp. at 882-884; 678 F.2d at 477-478 (25a-30a and 65a-66a). This holding was in error. Section 176 of the Clean Air Act, 42 U.S.C. §7506, provides for the withholding of certain federal funds by administrative action only when it is determined, after an administrative hearing, that a state has failed either to submit to the United States Environmental Protection Agency, or to carry out, a state implementation plan for the attainment of air quality standards ("SIP"). The funds that may be withheld for failure of a state to implement any portion of a SIP are limited to the federal subsidy for state air pollution control programs, §176(b). Federal highway funds may only be withheld for failure to submit any SIP at all, §176(a). These provisions can be invoked only by the United States Department of Transportation or the Environmental Protection Agency, not by a court, although a court may refer a case to an agency for imposition of proper sanctions under appropriate circumstances. See *Reichenthal v. Harris*, 492 F. Supp. 637 (E.D. N.Y. 1980) (per Weinstein, J.)

Thus, Congress has expressly determined the circumstances and procedures under which federal monies will flow to the states and has left to the executive branch the power and duty to determine whether these circumstances exist and the sanctions to impose if they do not. Implicitly then, Congress has also determined that the money shall flow *unless* the executive branch makes the appropriate determinations. Here, since Pennsylvania *has* submitted

a SIP, and in fact, is implementing all elements of that SIP in all respects except I/M, §176(b) is the only statute that the EPA itself could have invoked under these circumstances.[14]

Section 176 is a traditional exercise by Congress of its spending power as an inducement to the states to exercise their police power, with precisely drawn gradations. The District Court and the Third Circuit, however, transformed this into a coercive sanction that even the Executive Branch could not have imposed in administrative proceedings under Section 176. By blocking the payment of appropriated funds to Pennsylvania under circumstances not contemplated by Congress, the lower courts have improperly interfered with the exercise by Congress of its exclusive power of appropriation. Such interference is not permitted, even in exercising the broad judicial power to sanction contempt. By permitting such interference, the Third Circuit decision conflicts with the decision of the Eighth Circuit in *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1111 (8th Cir. 1973). This conflict, and the important issue raised thereby, should be resolved by this Court.

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[14] In fact, EPA has commenced proceedings to impose Section 176(b) sanctions and has not acted to impose Section 176(a) sanctions. See 47 Fed. Reg. 9477 (March 5, 1982) and 47 Fed. Reg. 25743 (June 15, 1982).

2. The lower Courts' decision to impose sanctions without considering the effect of the sanctions on innocent third parties, including taxpayers and the traveling public, is an abuse of discretion and conflicts with the principles of the decisions of this Court in City of Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981) and the Seventh Circuit in Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972).

The lower courts have failed to consider the harm to the taxpayers of Pennsylvania and citizens and businesses in the areas affected by the highway funds cutoff, as well as others who travel through these areas, as a result of the courts' cutoff of highway funds. Courts of equity have an obligation to consider these interests, even when seeking to further laudable social goals.

In *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981), this Court held that a municipality could not be held liable for punitive damages in a civil rights action, because such damages would ultimately harm innocent taxpayers:

> Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither

> reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.

453 U.S. at 267. (Footnotes omitted.)

Identical policy considerations apply in the instant case. In fact, the courts have imposed a punitive sanction against the Commonwealth of Pennsylvania far more draconian than the $275,000 punitive damages involved in the *City of Newport*. The courts have cut off $141,000,000 in highway funds to which innocent Pennsylvania taxpayers are entitled this year; at least $80,000,000 of these funds may lapse by September 30, 1982. The cutoff will be felt by each motorist and business having any contact with Philadelphia and Pittsburgh. The cutoff for this year will cause a loss of about 14,000 jobs during times of already high unemployment. Over the next five years, the funding cutoff could cost 100,000 jobs and $1,000,000,000. As the Court held in the *City of Newport* case, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." 453 U.S. at 267.

The harsh remedy upheld by the Third Circuit also stands in stark contrast to the principles of the decision of the Seventh Circuit in *Gautreaux v. Romney*, 457 F.2d 124 (7th Cir. 1972). In *Gautreaux*, the Seventh Circuit properly conducted a balancing test and reversed a District Court order that had cut off $26,000,000 in Model Cities funding for Chicago because of housing discrimination in the city. The Seventh Circuit held:

> Certainly, the District Court's order lacked a balancing of the individual and collective interests in-

> volved. The Court ignored the interest of poor people, mostly Black, intended by Congress to be the beneficiaries of the Model Cities program while seeking enforcement of a timetable for the erection of housing units in white areas which although laudable, could not be achieved in time to prevent the catastrophe threatened by the District Court's order terminating Federal funds to a program not found to be discriminatory.

457 F.2d at 127.

In this case, the lower courts have totally ignored the balancing test employed in *Gautreaux*,[15] and have failed to consider the effect of the highway funds cutoff on innocent citizens and businesses who pay taxes and use highways. The remedy chosen by the lower courts is a clear abuse of discretion under the circumstances.

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[15] The Circuit Court attempted to distinguish *Gautreaux* on the superficial basis that it "involved not the appropriateness of a coercive sanction to compel compliance with an incontestably valid final injunction, but the scope of injunctive relief in the first instance." 678 F.2d at 478 (67a-68a). As Judge Bechtle observed, however, a court sits in equity when it fashions a coercive remedy. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth*, 538 F. Supp. 869, 882 (25a). It follows that a court should properly exercise equitable discretion in imposing a contempt sanction. The Court of Appeals' statement that the *Gautreaux* injunction was "relief in the first instance" glosses over the factual history of the *Gautreaux* case. At the time of the Circuit Court's decision in *Gautreaux*, litigation had been pending for seven years, during which time the City of Chicago had been subjected to other mandatory orders by the District Court. It is factually incorrect, in the face of this case history, to distinguish *Gautreaux* on the grounds that *Gautreaux* involved only "injunctive relief in the first instance".

3. The lower Courts' orders requiring review of highway project approvals invalidly intrude upon the decision-making processes of state and federal administrative officials.

The District Court has given itself the right to review each of the highway projects in the I/M areas that the Secretary of Transportation certifies for approval on air quality, safety, or mass transit grounds. *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. at 885 (34a). The District Court's order will add one or more layers of review to the highway certification process in Pennsylvania—a process that already includes many years of decision-making by state and local officials.

In effect, the District Court has set itself up as the receiver for any federal highway funds allocated to the Philadelphia and Pittsburgh areas. The court will review all determinations by the United States Department of Transportation that a particular highway project is related to safety, air quality, or mass transit. The court will have the power to refuse approval of the project, if it feels that the project is not related to these areas.

The funds cutoff and this method of review will give the District Court total power to decide whether and what federal aid highway projects do and do not get funded in Pennsylvania. In so doing the Courts simply created a new judicial method of administering highway funds and short-circuited the normal process of highway planning and development that takes many years and extensive cooperation between federal, state, regional and local officials and the public. Highway planning and development cover the national and the state highway system, and are

based upon a number of professional judgments including such factors as safety considerations, industrial and commercial development, fiscal constraints and priorities, engineering considerations, existing and projected road conditions, mass transit alternatives, other transportation alternatives, transportation capacity, projected population, and vehicle ownership. This intrusion and expansion of judicial power are contrary to this Court's reasoning in *Rizzo v. Goode*, 423 U.S. 362 (1976), *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Youngberg v. Romeo*, U.S. , 102 S.Ct. 2452 (1982), that, even in civil rights cases (which this case is not), federal courts should not substitute their own decisions for those of executive branch professionals and should not make unwarranted intrusions into the processes of federal, state and local governments. This Court should review this important question.

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit in this case.

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